

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JOHN J. McNABOE,)
)
Plaintiff/Appellee,)
)
v.) C.A. No. 97-558-SLR
)
NVF COMPANY, BRENDA NESTOR)
CASTELLANO, and EVANS TEMPCON,)
)
Defendants/Appellants.)

MEMORANDUM ORDER

I. INTRODUCTION

On October 9, 1997, plaintiff John J. McNaboe brought this action against defendants NVF Company ("NVF"), Evans Tempcon ("Evans"), and Brenda Nestor Castellano ("Castellano"). (D.I. 1) As set forth in his second amended complaint, plaintiff asserted claims for: (1) breach of employment contract against NVF and Evans; (2) breach of the covenant of good faith and fair dealing against NVF and Evans; (3) violations of the Delaware Wage Payment and Collection Act ("WPCA") against NVF and Evans; (4) age discrimination under the ADEA against NVF and Castellano; (5) violation of ERISA against NVF; and (6) tortious interference with contractual relations against Castellano. (D.I. 31) On August 14, 1998, defendants answered denying all allegations and asserted counterclaims for breach of fiduciary duty and violations of the obligations of good faith and fair dealing. (D.I. 81)

This court held a jury trial from February 1, 1999 to February 12, 1999. At trial, plaintiff voluntarily withdrew his ERISA claim. (D.I. 266 at 200) After plaintiff rested, the court granted defendants' motion for judgment as a matter of law ("JMOL") with respect to plaintiff's tortious interference claim against Castellano and plaintiff's claims against NVF under the Deferred Retirement Income Security Plan ("DRISP"). (D.I. 264 at 162-63)

On February 16, 1999, the jury returned its verdict finding that defendants NVF and Evans had breached their respective employment contracts with plaintiff, had violated the covenant of good faith and fair dealing, and had failed to pay plaintiff wages owed to him without reasonable grounds. (D.I. 256) However, the jury found that NVF had not violated the ADEA when it terminated plaintiff. (Id.) With respect to defendants' counterclaims, the jury found for the plaintiff on all counts. Id. Plaintiff was awarded damages against NVF and Evans in the amount of \$458,800 and the court entered judgment on the verdict on February 17, 1999. (Id.)

On post-trial motions, the court granted defendants' renewed motion for JMOL on the breach of employment contract claim, but denied its motion with respect to the breach of covenant of good faith and fair dealing claim. (D.I. 270, 298) See McNaboe v. NVF Co. et al., 2000 U.S. Dist. LEXIS 4418 (D. Del. March 20,

2000). The court also granted defendants' motion for JMOL on the WPCA claim with respect to NVF but denied it with respect to Evans. (Id.) On August 2, 2000, the court entered its amended final judgment in favor of plaintiff and against NVF in the amount of \$518,208 and against Evans in the amount of \$9,874. After judgment was entered, defendants filed a notice of appeal with the United States Court of Appeals for the Third Circuit and plaintiff cross-appealed. (D.I. 333, 337)

Plaintiff then moved for attorneys' fees and expenses for his claims against Evans. (D.I. 340) Defendants answered asserting that plaintiffs' calculation of fees was unreasonable. (D.I. 351) Defendants NVF and Castellano also moved for attorneys' fees against plaintiff for expenses affiliated with defending the ERISA and ADEA claims. (D.I. 342)

On January 8, 2001, this court granted defendants' motion to stay execution of the judgment and required defendants to deposit \$575,000 in lieu of a supersedeas bond pending appeal to the Third Circuit. (D.I. 338) Thereafter, defendants deposited the \$575,000 with the Clerk of the Court. Accordingly, the court stayed plaintiff's and defendants' motions for attorneys' fees and expenses pending appeal to the Third Circuit. (D.I. 340, 342, 355)

On appeal, the Third Circuit ruled that the judgment in favor of NVF on the breach of contract claim was reversed, and

the judgment on that count in favor of plaintiff was to be reinstated. McNaboe v. NVF Co. et al., 276 F.3d 578 (3d Cir. 2001). The Third Circuit also ruled that the judgment in favor of plaintiff on the covenant of good faith was vacated and judgment would be entered in favor of defendants on that count. Id. Finally, the Third Circuit remanded the court's calculation of prejudgment interest for recalculation and affirmed on all other issues. (Id.)

Plaintiff then filed a motion to lift the stay of execution and disburse the funds defendants deposited to him. (D.I. 361) Defendants also filed a motion to lift the stay and return the funds to them. (D.I. 364) Plaintiff also moved to alter or amend judgment and award him attorneys' fees on his WPCA claim. (D.I. 372) After hearing oral arguments on these motions, the court issued a memorandum order granting plaintiff's motion to lift the stay of execution, denying defendants' motion, and denying plaintiff's motion to alter or amend judgment. (D.I. 388)

Presently before the court is plaintiff's renewed motion for attorneys' fees and expenses against Evans Tempcon (D.I. 340), defendants' motion for attorneys' fees and expenses (D.I. 342), and defendants' motion for stay of order authorizing disbursement of bond proceeds (D.I. 389).

II. DISCUSSION

A. Plaintiff's Motion for Attorneys' Fees and Expenses

1. Fees and Expenses Under the WPCA

Plaintiff argues that having successfully litigated his claims against Evans for violation of the WPCA, he is entitled to an award of attorneys' fees and expenses pursuant to § 1113(c) of the Act. (D.I. 341 at 5) Section 1113(c) of the WPCA states that

[a]ny judgment entered for a plaintiff in an action brought under this section shall include an award for the costs of the action, the necessary costs of prosecution and reasonable attorneys' fees, all to be paid by the defendant.

19 Del. C. § 1113(c).

As discussed above, plaintiff was successful against Evans in his claim under the WPCA. The jury awarded plaintiff \$4,615.38 against Evans for violation of the WPCA. The court awarded liquidated damages and prejudgment interest on this amount pursuant to § 1103(b) of the Act, resulting in a final judgment against Evans of \$9,874. The Third Circuit affirmed this ruling. Having prevailed on the WPCA claim, the court concludes that plaintiff is entitled to reasonable attorneys' fees and expenses in connection with his claim against Evans.

2. Reasonable Attorneys' Fees and Expenses

The method for establishing statutory fees is well settled

by Supreme Court cases. See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 564, 92 L. Ed. 2d 439, 106 S. Ct. 3088 (1986). Both state and federal courts in this jurisdiction have adopted the "lodestar" approach to calculate reasonable fees granted pursuant to statutes. Brytus v. Spang & Co., 203 F.3d 238, 242 (3d Cir. 2000). "The court must start by taking the amount of time reasonably expended by counsel for the prevailing party on the litigation, and compensate that time at a reasonable hourly rate to arrive at the lodestar." Id.; see also Amico v. New Castle County, 654 F. Supp. 982, 997 (D. Del. 1987). "A predicate to performing this analysis into reasonableness is the court's ascertainment of whether the hours claimed are adequately documented." Amico, 654 F. Supp. at 997. "Where the documentation of hours is inadequate, the district court may reduce the award accordingly." Id. Both plaintiff and defendants agree that these are the proper standards for determining reasonable fees and expenses. (D.I. 341, 351)

Plaintiff's attorneys concede that it was not their usual practice to record their time specifically billed to Evans during the litigation. (D.I. 341 at 9) However, they contend that approximately 8-10% of all time expended in the litigation as a whole was devoted to plaintiff's prosecution of claims against Evans. (Id. at 10) Based on this estimate, plaintiff's

attorneys claim that this would result in an amount between \$40,000 and \$50,000. (Id.) However, "in the exercise of plaintiff's attorneys' billing judgment," plaintiff requests only \$11,650 in fees and expenses. (Id. at 10, 12)

Defendants argue that in light of plaintiff's award of \$9,874 on his claim, the taxing of fees in excess of the award is unreasonable. (D.I. 351) Upon reviewing the documentation and affidavits submitted by plaintiff's attorneys, the court concludes plaintiff's request for \$11,650 in fees and expenses is unreasonable.

As plaintiff's attorneys concede, the only documentation they can produce showing time billed directly to the Evans matter are billing records totaling \$4,089.25. (See D.I. 340, Ex. D) In order to supplement this documentation, plaintiff submitted affidavits from three attorneys who worked on the case. (D.I. 340, Exs. 1, E and F) While affidavits may be used to supplement sparse records, they must provide some detail as to what matters the attorney submitting the affidavit actually billed. See Amico, 654 F. Supp. at 999. In this case, the affidavits submitted by plaintiff's counsel offer no more than speculation as to how much time was spent specifically on Evans' claims. As such, these affidavits are inadequate to prove any additional fees or expenses beyond what is adequately documented. Therefore, the court concludes that plaintiff is entitled to an

award of attorneys' fees and expenses in the amount of \$4,089.25.

B. NVF and Castellano's Motion for Attorneys' Fees and Expenses

1. The Standard for Attorneys' Fees Under ERISA

NVF contends that since plaintiff withdrew his ERISA claim during trial, it is entitled to attorneys' fees as the prevailing party under § 502(g)(1) of ERISA. (D.I. 343 at 2) Section 502(g)(1) states that

[i]n any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

29 U.S.C. § 1132(g)(1). In determining whether to award attorneys' fees and costs under § 502(g)(1), the Third Circuit has adopted a five-factor policy analysis. Ursic v. Bethlehem Mines, 719 F.2d 670, 673 (3d Cir. 1983). The five factors are:

- (1) the offending parties' culpability or bad faith;
- (2) the ability of the offending parties to satisfy an award of attorneys' fees;
- (3) the deterrent effect of an award of attorneys' fees against the offending parties;
- (4) the benefit conferred on members of the pension plan as a whole; and
- (5) the relative merits of the parties' position.

Id. In light of the foregoing factors, the court concludes that NVF is entitled to a reasonable award of attorneys' fees and expenses in connection with its defense of plaintiff's ERISA claim.

a. The offending parties' culpability or bad faith

In analyzing the first factor of the Ursic test, the Third Circuit has stated:

The first Ursic factor favors an award to the prevailing party not only in cases involving 'bad faith' but in other cases as well.... A losing party may be culpable, however, without having acted with an ulterior motive. In a civil context, culpable conduct is commonly understood to mean conduct that is "blameable; censurable; ... at fault; involving the breach of a legal duty or the commission of a fault.... Such conduct normally involves something more than simple negligence.... [On the other hand, it] implies that the act or conduct spoken of is reprehensible or wrong, but not that it involves malice or a guilty purpose."

McPherson v. Employees' Pension Plan of Am. Re-Insurance Co., 33 F.3d 253, 256-57 (3d Cir. 1994). Plaintiff initially sought nearly six million dollars in damages on his ERISA claim. (D.I. 344, Ex. A1 at ¶ 3) This amounted to nearly 75% of the eight million dollars in damages plaintiff initially sought. (Id.) Plaintiff subsequently reduced this amount to less than \$300,000 in his pre-trial statement of damages. (D.I. 199 at 62) Ultimately, plaintiff withdrew the ERISA claim altogether during trial.

Given plaintiff's continual changing of theories and positions throughout the litigation regarding his ERISA claim, and the ultimate withdrawal of this claim altogether, the court concludes that plaintiff's conduct, while perhaps not rising to the level of bad faith, is certainly culpable. Plaintiff adhered

to his virtually untenable ERISA claim until trial and required NVF to expend resources defending against it. As such, the first factor weighs in favor of granting defendant reasonable attorneys' fees and expenses.

b. The ability of the offending parties to satisfy an award of attorneys' fees

NVF contends that based on plaintiff's salary at NVF and his subsequent salary at Sunbeam, he is in a financial position to satisfy an award of attorneys' fees. (D.I. 343 at 18) Plaintiff does not deny NVF's assertion, but rather argues that the court should not rely on NVF's assertions. (D.I. 349 at 16) Based on the record, and given plaintiff's award on other claims, the court concludes that plaintiff has the financial means to satisfy a reasonable award.

c. The deterrent effect of an award of attorneys' fees against the offending parties

The Third Circuit has stated that "the statutory purpose of ERISA [is] to protect pension benefits." Ellison v. Shenango Inc. Pension Bd., 956 F.2d 1268, 1277 (3d Cir. 1992). "Accordingly, the policy behind awarding attorney's fees and costs pursuant to § 502(g) is to uphold the general purpose of ERISA by protecting pension benefits." Loving v. Pirelli Cable Corp., 11 F. Supp. 2d 480, 498 (D. Del. 1998). Based on plaintiff's pleadings and positions throughout this litigation, the court concludes that plaintiff's ERISA claim was not aimed at

protecting his pension benefits, but rather to ensure federal jurisdiction over what essentially amounted to a breach of contract claim. Awarding reasonable attorneys' fees would act as a deterrent against parties bringing meritless ERISA claims for purposes of obtaining federal jurisdiction.

d. The benefit conferred on members of the pension plan as a whole

This factor has no relevance to the case at bar.

e. The relative merits of the parties' position

As discussed above, given plaintiff's backpedaling from his ERISA claim and its ultimate withdrawal, the court concludes that this claim was meritless and factor five weighs in favor of granting NVF reasonable fees.

2. Reasonable Fees and Expenses for Defending the ERISA Claim

Plaintiff's conduct has imposed a financial burden on defendants by forcing defendants to respond to a meritless ERISA claim. Defendants were required to spend time preparing an answer to the complaint, and researching and preparing motions for summary judgment, and for attorneys' fees and costs. Nonetheless, the court finds that the nearly \$1.3 million dollars in fees and expenses defendants request is an extraordinarily large sum of money to award NVF, and that a lesser fee will more fairly serve the purpose of § 502(g). The 1993 Advisory Committee Notes state that "partial reimbursement of fees may

constitute a sufficient deterrent with respect to violations by persons having modest financial resources." Additionally, the Third Circuit has cautioned that an award of attorneys' fees and costs under § 502(g) should not "amount[] to an excessively punitive sanction." Ursic, 719 F.2d at 677.

Defendants request \$1,177,693 in attorneys' fees, and \$119,157 in costs. This amounts to a grand total of \$1,296,850 in attorneys' fees and expenses. (D.I. 353, Ex. A) In support of this figure, defendants submit a number of affidavits and billing reports documenting the various attorneys' time. Defendants urge the court to allocate one-third the total time spent on the case to ERISA related expenses, one-third to ADEA expenses, and the remaining one-third to the rest of the issues. (D.I. 353 at 11) Therefore, a threshold issue is whether or not one-third of the time spent on the case can be attributed to defendants' defense of the ERISA claim. The court concludes that it cannot.

Based on a review of all the parties' pleadings, briefs, and other documents filed in this case related to ERISA, the court concludes that allocating one-third the total billing solely to ERISA issues is unwarranted. Given the fact that the ERISA claim was never tried, and the amount of attention it was given in pre- and post-trial briefing, the court concludes that 20% is a more reasonable amount of time that defendants spent solely on ERISA

related issues. As defendants repeatedly assert, this was essentially a state law breach of contract claim. The parties' focus in the briefing and at trial evidences this assertion. Accordingly, the court holds that \$260,000, approximately 20% of \$1,296,850, can reasonably be attributed to defendants' defense of plaintiff's ERISA claim. However, the inquiry does not end here.

Once the threshold question of how much time can defendants reasonably attribute to its defense of plaintiff's ERISA claim, the court must then apply the lodestar standards enumerated above to determine the reasonableness of the amount defendants ask for. In support of these amounts, defendants submitted voluminous appendices to their briefs. (D.I. 344, 345, 346) As discussed above, these appendices include attorneys' affidavits and detailed billing reports from each attorney. After careful review of these billing reports, the court found that many time entries, particularly costs and expenses, were not described in sufficient detail to attribute them to this case at all, let alone to defendants' defense of the ERISA claim. Furthermore, many time entries were either duplicative or unreasonable. Therefore, the court concludes that a downward modification of \$100,000 is warranted. As such, the court concludes that a reasonable amount of fees and expenses attributed to NVF's defense of plaintiff's ERISA claim is \$160,000.

3. The Standard for Attorneys' Fees Under the ADEA

The ADEA incorporates selected provisions of the Fair Labor Standards Act ("FLSA"), including the provisions pertaining to the award of attorneys' fees. See 29 U.S.C. § 626(b). While these provisions do not address whether, or under what circumstances, attorneys' fees should be awarded to a prevailing defendant, defendants argue that courts have awarded prevailing defendants attorneys' fees in ADEA cases. (D.I. 343 at 19) Although defendants cite no cases in this jurisdiction in support of their argument, they cite to cases in other jurisdictions that awarded attorneys' fees to prevailing defendants under the ADEA. See, e.g., Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1437-38 (11th Cir. 1998); Newhouse v. McCormick & Co., Inc., 130 F.3d 302, 304 (8th Cir. 1997); Miller v. State Chemical Mfg. Co., 706 F. Supp. 1166, 1172 (W.D. Pa. 1988). However, in each of these cases, the court awarded attorneys' fees to a prevailing defendant after a finding that the plaintiff had brought its ADEA claim in bad faith. Defendants argue that plaintiff's ADEA claim was baseless and brought in bad faith. (D.I. 343 at 20) The court concludes, however, that plaintiff's ADEA claim, while not a winning claim at trial, was not brought in bad faith.

During the litigation, plaintiff's ADEA claim survived defendants' motions for dismissal and summary judgment, and ultimately went to the jury. As the court noted before sending

the ADEA claim to the jury, plaintiff's evidence met the applicable standards for a jury to infer age discrimination from the evidence of pretext presented at trial.

As defendants do not cite, nor has the court found, any cases in this jurisdiction, or any other jurisdiction, that awarded a prevailing defendant in an ADEA claim attorneys' fees absent a showing of bad faith, the court declines to award NVF or Castellano attorneys' fees on plaintiff's ADEA claims in this case.

III. CONCLUSION

At Wilmington this 31st day of October, 2002, having reviewed papers submitted in connection therewith, for the reasons stated;

IT IS ORDERED that:

1. Plaintiff's motion for attorneys' fees and expenses (D.I. 340) is granted. Plaintiff is entitled to attorneys' fees and expenses in the amount of \$4,089.25.

2. Defendants' motion for attorneys' fees and expenses (D.I. 342) is granted in part and denied in part. With respect to defendant NVF's motion for attorneys' fees and expenses for its defense of plaintiff's ERISA claim, the motion is granted. Defendant NVF is entitled to attorneys' fees and expenses in the amount of \$160,000. With respect to defendants NVF and Castellano's motion for attorneys' fees for their defense of

plaintiff's ADEA claim, the motion is denied.

3. Defendants' motion for stay of order authorizing disbursement of bond proceeds (D.I. 389) is denied as moot.

IT IS FURTHER ORDERED that the Clerk of the Court is instructed to subtract the amount of \$155,910.75 from the amount due to plaintiff under this court's Order (D.I. 388) and to disburse the funds accordingly.

Sue L. Robinson
United States District Judge